SRS Sports Centre Sdn Bhd v World Triathlon Corp

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-575–10 OF 2015
NORDIN HASSAN J
3 NOVEMBER 2017

Civil Procedure — Stay of Action — Forum non-conveniens — Defendant filed application under O 12 r 10 and O 92 r 4 of the Rules of Court 2012 — Exclusive jurisdiction clause in contract to commence litigation out of Malaysia — Whether court had jurisdiction to hear plaintiff's claim — Whether court appropriate forum

The plaintiff had filed a writ and statement of claim against the defendant for, inter alia, a declaration that the termination of the license agreement ('the agreement') between both the plaintiff and defendant was unlawful. In response, the defendant filed the present application ('encl 47') pursuant to O 12 r 10 and O 92 r 4 of the Rules of Court 2012 that this proceeding to be stayed on the basis that Malaysia was not the proper forum. It was submitted by the defendant that there was an exclusive clause in the agreement where both parties agreed that the United States District Court, Middle District of Florida, Tampa Division or the Circuit Court located in Pinellas County, Florida ('the courts in United States of America') shall be the venue of any litigation arising out of or relating to the agreement. It was further submitted that the courts in United States of America was the most appropriate forum to try this case on three grounds: (a) that the Malaysian Courts had no jurisdiction and/or Malaysia was not the proper forum for the dispute; (b) there were special circumstances to warrant the stay of proceedings; and (c) the balance of convenience or balance of justice lay in favour of stay of proceedings. In reply to that, the plaintiff submitted, inter alia, that: (i) the plaintiff was a company incorporated and registered in Malaysia; (ii) the subject matter of the agreement was in Malaysia; (iii) that there was fraud and/or conspiracy involving one of the plaintiff's directors and the defendant's representative; (iv) the Ministry of Finance Malaysia approved the funding of the subject matter of the agreement; and (v) all fees and payment organised by the plaintiff was paid into the plaintiff's bank account by way of online banking.

Held, dismissing encl 47 with costs of RM3,000 subject to allocator:

(1) The witnesses to the subject matter of the agreement, financing of the events including online payments of the fees, the fraud and conspiracy by one of the plaintiff's director were all in Malaysia. The plaintiff would have to bear substantial expense and inconvenience to bring all these

witnesses to the courts in the United States. Further, the plaintiff was a Malaysian incorporated company and had its place of business in Malaysia. Evidence including documents relating to the agreement and the subject matter of the agreement had to be given by the plaintiff's representatives who resided in Malaysia. Therefore, the evidence on issues of fact was situated or more readily available in Malaysia. In the circumstances, the plaintiff had shown a strong case to override the forum selection clause and to have the suit to be tried in Malaysia (see paras 13–16).

(2) The cause of action arose in Kuala Lumpur as the termination of the agreement was done via a letter issued by the defendant to the plaintiff in Kuala Lumpur. Hence, the court had the jurisdiction to hear the case pursuant to s 23(1)(a) of the Courts of Judicature Act 1964 (see para 17).

(3) In the present case, the plaintiff had proved a strong case why the forum selection clause should not be applicable and the defendant had not established why the courts in the United States of America was more appropriate. The defendant provided no reason for this case not to be tried by this court (see para 21).

[Bahasa Malaysia summary

Plaintif telah memfailkan writ dan penyataan tuntutan terhadap defendan untuk, antara lain, suatu deklarasi bahawa penamatan perjanjian lesen ('perjanjian') antara plaintif dan defendan adalah menyalahi undang-undang. Sebagai tindak balas, defendan memfailkan permohonan ini ('lampiran 47') menurut A 12 k 10 dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 agar prosiding ini digantung kerana Malaysia bukan forum yang sepatutnya. Defendan berhujah bahawa perjanjian tersebut mengandungi klausa bidang kuasa eksklusif di mana kedua-dua pihak bersetuju bahawa Mahkamah Daerah Amerika Syarikat, Daerah Tengah Florida, Bahagian Tampa atau Mahkamah Litar yang terletak di Pinellas County, Florida ('mahkamah-mahkamah di Amerika Syarikat') akan menjadi tempat litigasi berikutan atau berkaitan dengan perjanjian. Defendan berhujah selanjutnya bahawa mahkamah-mahkamah di Amerika Syarikat adalah forum yang paling sesuai untuk membicarakan kes ini atas tiga alasan: (a) bahawa mahkamah Malaysia tidak mempunyai bidang kuasa dan/atau Malaysia bukan forum yang sesuai untuk pertikaian ini; (b) terdapat keadaan khas untuk menggantungkan prosiding ini; dan (c) imbangan kebarangkalian atau imbangan keadilan memihak kepada penggantungan prosiding. Sebagai balasan, plaintifmenghujahkan, antara lain, bahawa: (i) plaintif adalah syarikat yang diperbadankan dan didaftarkan di Malaysia; (ii) subjek perjanjian adalah di Malaysia; (iii) terdapat penipuan dan/atau konspirasi yang melibatkan salah satu pengarah plaintif dan wakil defendan; (iv) Kementerian Kewangan Malaysia telah meluluskan pembiayaan bagi perkara perjanjian; dan (v) semua bayaran dan pembayaran yang dianjurkan oleh plaintif dibayar ke dalam akaun

bank plaintif melalui perbankan online.

Diputuskan, menolak lampiran 47 dengan kos sebanyak RM3,000 tertakluk kepada alokatur:

(1) Saksi-saksi kepada perkara perjanjian, pembiayaan acara-acara termasuk bayaran yuran *online*, penipuan dan konspirasi oleh salah satu pengarah plaintif berada di Malaysia. Plaintif perlu menanggung perbelanjaan dan kesulitan yang besar untuk membawa semua saksi ini ke mahkamah-mahkamah di Amerika Syarikat. Selanjutnya, plaintif adalah syarikat yang diperbadankan di Malaysia dan mempunyai tempat perniagaannya di Malaysia. Bukti termasuk dokumen yang berkaitan dengan perjanjian dan hal-hal yang berkaitan dengan perkara pokok perjanjian harus diberikan oleh wakil plaintif yang menetap di Malaysia. Oleh itu, bukti berkenaan isu-isu fakta terletak atau lebih mudah didapati di Malaysia. Dalam keadaan tersebut, plaintif telah menunjukkan kes yang kukuh untuk mengatasi klausa pemilihan forum dan untuk membuat tuntutan tersebut dibicarakan di Malaysia (lihat perenggan 13–16).

(2) Kausa tindakan timbul di Kuala Lumpur kerana penamatan perjanjian dilakukan melalui surat yang dikeluarkan oleh defendan kepada plaintif di Kuala Lumpur. Oleh itu, mahkamah mempunyai bidang kuasa untuk mendengar kes menurut s 23(1)(a) Akta Mahkamah Kehakiman 1964 (lihat perenggan 17).

(3) Dalam kes ini, plaintif telah membuktikan kes yang kukuh bahawa klausa pemilihan forum tidak terpakai dan defendan tidak dapat membuktikan bahawa mahkamah-mahkamah di Amerika Syarikat lebih sesuai. Defendan tidak memberi alasan bahawa kes ini tidak sesuai untuk dibicarakan oleh mahkamah ini (lihat perenggan 21).]

Notes

For cases on forum non-conveniens, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8900–8901.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160, FC (refd)

Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria [1981] 2 Lloyd's Rep 119, CA (refd)

Globus Shipping & Trading Co (Pte) Ltd v Taiping Textitle Berhad [1976] 2 MLJ 154, FC (refd)

Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322, CA (refd)

The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v

A *Owners of Ship or Vessel Eleftheria* [1969] 2 All ER 641 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)(a)
Rules of Court 2012 O 12 r 10(2), O 92 r 4

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M Rajan (Hakem Arabi & Assoc) for the plaintiff.
Nimalan Devaraja (Joyce Lim with him) (Skrine) for the defendant.

Nordin Hassan J:

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INTRODUCTION

[1] Enclosure 47 is the defendant's notice of application pursuant to O 12 r 10(2) and O 92 r 4 of the Rules of Court 2012 for an order as follows:

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(a) a declaration that Malaysia is not a proper forum to determine the dispute and/or the subject matter of the claim; and

(b) the proceedings against the defendant be stayed on the basis that Malaysia is not the proper forum to determine the dispute and/or the subject matter of the claim.

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[2] The grounds of the defendant's application as stated in the notice of application among others are the followings:

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(a) the Malaysian courts has no jurisdiction and/or Malaysia is not the proper forum for the dispute;

(b) there are special circumstances to warrant the stay of proceedings; and

(c) the balance of convenience or balance of justice lies in favour of stay of proceedings.

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THE BACKGROUND FACTS

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[3] The silent facts as set out in the statement of claim and affidavits filed in this case are as follows:

(a) on 15 February 2000 the plaintiff and the defendant executed the first license agreement in which the plaintiff was given a sole and exclusive right and licence to organise triathlon events in Malaysia under the trademark known as 'Ironman'. This trademark is exclusively owned by the defendant;

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(b) the first license agreement ended on the 30 October 2004 and before the expiration of this agreement, on 20 October 2003, both parties entered

into an agreement known as event license agreement whereby the first license agreement was extended from 2005 until 31 March 2009;

(c) the event license agreement contains an exclusive jurisdiction clause, which is cl 20, that states as follows:

> ... This agreement will be deemed to have been executed and delivered in the States of Florida, *and will be construed and interpreted according to the laws of that State and of the United States of America ... in any litigation arising out of or relating to this Agreement, the parties agree that venue shall be in the United States District Court, Middle District of Florida, Tampa Division or the Circuit Court locted in Pinellas Country, Florida*.

(d) in 2005, the event license agreement was terminated by the defendant on the ground that the plaintiff had breached the said agreement by not paying the license fees within the stipulated time;

(e) dissatisfied with the said termination, the plaintiff filed legal suit against the defendant at United States District Court, Florida seeking a declaratory order that the termination of the agreement is invalid and unenforceable;

(f) the suit was then settled amicably in which the defendant agreed to extend the license agreement;

(g) thereafter, another agreement was executed by parties on 11 December 2008 known as first addendum to event license agreement dated 20 October 2003. It is the terms of the agreement that the event license agreement dated 20 October 2003 is extended until 30 October 2014 and all the terms and conditions in the event license agreement continue to be enforceable;

(h) subsequently, the defendant issued a letter dated 3 September 2009, informing the plaintiff about defaults by plaintiff including default in making payment of the license fees and instructed the plaintiff to rectify the said defaults within 15 days from the date of the letter. Failing which, the defendant will terminate the agreement;

(i) in reply, by email dated 18 September 2009, the plaintiff informed the defendant that some of the complaints by the defendant had been resolved but the plaintiff requested for additional time to rectify all the defaults due to the delay of government funding and approval for the triathlon events;

(j) however, by letter dated 23 October 2009, the defendants informed the plaintiff that the said agreement is terminated due to the plaintiff's failure to rectify the defaults stated in the defendant's letter dated 18 September 2009;

(k) in 2010, the plaintiff discovered that the defendant has given the license and consent to one of the plaintiff's director, Chandrakumar s/o Arumugam to organise Ironman events in Malaysia. This license were granted the same day the plaintiff received the termination letter; and

(l) on 22 October 2015, the plaintiff filed the writ and statement of claim against the defendant among others for a declaration that the termination of the license agreement dated 11 August 2009 by the defendant is unlawful and other consequential relief.

ANALYSIS AND FINDINGS OF THIS COURT

[4] The defendant's application vide encl 47 is premised on the exclusive jurisdiction clause, or also known as forum selection clause and the defendant contends that United States District Court, Middle District of Florida, Tampa Division or District Court located in Pinellas Country, Florida is the most appropriate forum to try this case.

[5] The law in regards to the issue of forum selection clause has been succinctly explained by the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textitle Berhad* [1976] 2 MLJ 154 which also has adopted the principle in the English case of *The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v Owners of Ship or Vessel Eleftheria* [1969] 2 All ER 641.

[6] Gill CJ (Malaya) (as he then was), in *Globus Shipping*, at the p 155, said this:

> As regards the general principles in relation to jurisdiction where parties have agreed to submit exclusively to a foreign jurisdiction, the case of *The Fehmaris* Wilmer J said at p 710:
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> > *Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be over-ridden and that proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be a matter for the discretion of the court, having regard to all the circumstances of the particular case*.
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> In the same case when it went up to the Court of Appeal Lord Denning said:
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> > The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: *and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the over-riding principle that no one by his*

private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.

[7] In the same case, the principle of law set out in the *Elefteria* was quoted as follows:

> On the question of whether or not the court should exercise its jurisdiction in cases where the parties have agreed to refer any disputes to a foreign court, Brandon J in *The Eleftheria* said:
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> > The principles established by the authorities can, I think be summarised as follows: *(1)* Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, *is not bound to grant a stay but has a discretion whether to do so or not*. *(2)* The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. *(3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case*. *(5)* In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded: *(a) In what country the evidence on the issues of fact is situated, or more readily available and the effect of that on the relative convenience and expense of trial as between the English and foreign courts*. *(b)* Whether the law of the foreign court applies and, if so, whether it deffers from English law in any material respects. *(c)* With that country either party is connected and how closely. *(d)* Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. *(e)* Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: *(i)* be deprived of security for their claim; *(ii)* be unable to enforce any judgment obtained; *(iii)* be faced with a time-bar not applicable in English; or *(iv)* for political, racial, religious or other reasons be unlikely to get a fair trial. (See also *Halsbury's Laws of England*, 4th Ed, Vol 1, p 281, para 440).

[8] The learned Chief Justice (Malaya) then concluded in the following words:

> *it would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied*.

[9] It is clear from the authorities cited above that a forum selection clause does not oust the jurisdiction of this court and this court has the discretion to hear the case or allow the case to be tried by the tribunal agreed by parties in the forum selection clause after having considered all relevant matters.

[10] In this regard, the burden is on the plaintiff to show a strong case to

override the agreement in the forum selection clause.

[11] Reverting to the present case, the material facts that can be summarised from the statement of claim, affidavit in reply filed by the plaintiff and the documents produced in this case are as follows:

(a) the plaintiff is a company incorporated in Malaysia under the Companies Act 1965 and its registered address is at No 19-E, Wisma Tie Yoon, Lorong Medan Tunku Satu, Kuala Lumpur;

(b) the subject matter of the event license agreements is for plaintiff to organise triathlon events in Malaysia under the name of Ironman;

(c) the plaintiff pleaded case of fraud and/or conspiracy involved one of the plaintiff's director, Mr Chandrakumar s/o Arumugam and the defendant's representative in relation to the termination of the said event license agreement;

(d) on 21 October 2009, Ministry of Finance Malaysia has approved the funding of RM500,000 to organise the triathlon event on 27 February 2010; and

(e) all participants in the triathlon event organised by the plaintiff have to pay certain fees and the payment is made by online banking into the plaintiff's bank account. It is also the plaintiff's pleaded case that, after the termination of the agreement, for the triathlon event on the 27 February 2010, all the participants fees were paid into Chandrakumar's bank account.

[12] Apart from this, before the termination of the said agreement, Dato Sri Ram, representative of the plaintiff, vide email dated 18 September 2009, had replied to the defendant's complaints and had explained the reasons for the defaults by the plaintiff.

[13] Here, I find that witnesses to the triathlon events organised by plaintiff, financing of the events including online payments of participants fees, the fraud and conspiracy by one of the plaintiff's director are all in Malaysia. This includes Dato Sri Ram who liased with defendant vide email to explained the defaults complained by the defendant. Certainly, the plaintiff will have to bear substantial expense and inconvenience to bring all these witnesses to Florida, United States.

[14] The plaintiff also is a Malaysian incorporated company and has its place of business in Malaysia. Evidence including documents relating to the event license agreement and matters related to the triathlon event has to be given by the plaintiff's representatives who reside in Malaysia.

[15] Therefore, the evidence on issues of fact is situated or more readily available in Malaysia. A

[16] In the circumstances, I find the plaintiff has shown a strong case to override the forum selection clause and to have the suit to be tried in Malaysia. B

[17] As the termination of the Agreement was vide letter dated 23 October 2009 by the defendant to the plaintiff in Kuala Lumpur, the cause of action arose in Kuala Lumpur. Therefore, this court has the jurisdiction to hear the case pursuant to sub-s 23(1)(a) of the Courts of Judicature Act 1964 which reads: C

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) The cause of action arose; D

[18] The other issue here is in regards to the differences of burden of proof in an application based on doctrine of forum non-conveniens and application based on forum selection clause. E

[19] As mentioned earlier, the plaintiff has to prove a strong case why the forum selection clause should not apply. However for doctrine of forum non-conveniens, it is for the defendant to show that some other forum is more appropriate. This has been explained by the Federal Court in the case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 where Peh Swee Chin FCJ said this: F

> The doctrine of forum non-conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritimen Corp v Cansulax Ltd (The Spiliada)* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Wu Min Aun, 'Stay of Actions and Forum Non Conveniens' [1994] 3 MLJ xcvii. G
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> The main judgment in the Spiliada was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v F Robinow* (1892) 19 R (Ct of Sess) 665 at p 668 being the fundamental principle in regard to this doctrine, ie that 'there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed. H I
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> *In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendan would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in The Spiliada*. Where, on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under

O 11 r 1 of the RHC is involved, then according to the reasoning of Lord Templeman, *the plaintiff (not the defendant, be it noted), would have to satisfy a Malaysian court that, by comparison, that Malaysian court is the most appropriate forum to try the action*.

Thus, it will be seen that in the instant case, the burden lay on the bank customers, the plaintiffs, to satisfy the High Court below that Malaysia was the most appropriate forum.

[20] The differences as to the burden of proof between application based on forum non-conveniens and forum of selection has also been acknowledged by the Court of Appeal in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322 where the judge said this:

It is now necessary to deal with the differences that exist between applications based on the doctrine of forum non-conveniens and those based on forum selection clauses.

I begin by recognising that the law has not yet reached the stage where uniform principles are to be applied to both types of cases. And I do not regard the decision of the Federal Court in American Express as having created such an inroad into this area of the law where both principle and authority tell against the unification of approach (see *Trendtex Trading Corporation and another v Créit Suisse* [1980] 3 All ER 721; [1982] AC 679 (HL)).

In the former, proceedings are properly commenced in this country. The defendant then applies to stay them on the ground that there exists elsewhere a forum that is more convenient to adjudicate upon the dispute. *The burden is therefore on the defendant to demonstrate why the suit should not proceed to disposal in the place where it has been commenced*.

In the latter, the plaintiff brings an action here in breach of an agreement to resolve the dispute in a foreign tribunal. The court is, of course, not bound to give effect to such an agreement. A forum selection agreement is to be treated upon the same footing as an agreement that confers jurisdiction. Since consent cannot create or confer jurisdiction upon a court that has none, it also cannot oust the jurisdiction that is properly seised of litigation.

[21] In the present case, as the plaintiff has shown a strong case why the forum selection clause should not be applicable and the defendant on the other hand, based on the affidavit in support, has not established that Florida is more appropriate forum, there is no reason for this case not to be tried by this court.

[22] Before I conclude, on the same issue, the Court of Appeal in *Inter Maritime* case, agrees with the approach taken in *Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria* [1981] 2 Lloyd's Rep 119 which are as follows:

That was a case where an application was made to stay an action on two grounds. *The first was based on a clause in the bill of lading which, inter alia, required all disputes*

to be decided in the country where the carrier (the defendant in that case) had his principal place of business. The defendant in that case had his principal place of business in Havana, Cuba. *The second ground was that England was forum non-conveniens*. Sheen J rejected the argument mounted on the contractual provision and in doing so he applied the statement of the law in *Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria* [1981] 2 Lloyd's Rep 119. This is what he said:

> The defendants move the court for a stay on the the alternative gound of 'forum non conveniens'. The matter which have to be considered by the court when exercising its discretion whether to give effect to an agreement to refer disputes to an foreign court include those matters which are relevant to an application to stay on this alternative ground of forum non conveniens. *As the plaintiffs have discharged the burden of showing strong grounds why I should not grant a stay of this action despite the agreement that any dispute should be decided in Cuba, it follows that the defendants would be unable to discharge the burden upon them of showing that, in the absence of such an agreement*, this action ought to be stayed.

In the present state of the law, I am unable to say that the approach adopted by Sheen J is wrong.

CONCLUSION

[23] On the foregoing grounds, the defendant's application vide encl 47 is dismissed with costs of RM3,000 to be paid to the plaintiff and costs is subject to payment of allocatur fee.

Enclosure 47 dismissed with costs of RM3,000 subject to allocator.

Reported by Lee TJ